

November 24, 1998

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

850 Union Bank of California Building
900 Fourth Avenue
Seattle, Washington 98164
Telephone (206) 296-4660
Facsimile (206) 296-1654

REPORT AND DECISION ON AN APPEAL FROM NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E9701343**

RALPH and MARGARET WELLS

Code Enforcement Appeal

Location: 32925 Southeast 46th Street, Fall City

Appellants: Ralph and Margaret Wells, 2004 132nd Avenue Southeast, Bellevue, WA 98005
Represented by **Linda M. Youngs**, Attorney At Law,
10777 Main Street #300, Bellevue, WA 98004
Telephone (425) 454-3374 Facsimile (425) 454-0087

Department: Department of Development and Environmental Services
Building Services Division, Code Enforcement Section
Represented by **Lamar Reed**
Telephone (206) 296-7101 Facsimile (206) 296-6604

SUMMARY OF RECOMMENDATIONS & DECISION:

Division's Preliminary Recommendation:	Deny Appeal
Division's Final Recommendation:	Deny Appeal
Examiner's Decision:	Appeal Granted

PRELIMINARY MATTERS:

Notice of appeal received by Examiner:	June 29, 1998
Statement of appeal received by Examiner:	June 29, 1998

EXAMINER PROCEEDINGS:

Prehearing conference:	September 22, 1998
Hearing Opened:	November 5, 1998
Hearing Closed:	November 5, 1998

Participants at the proceedings and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the Office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- Code Interpretation
- Landscaping
- Zoning Code
- Nonconforming Use
- Equipment Storage

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now

makes and enters the following:

FINDINGS:

1. Ralph and Margaret Wells (the “Appellant”) operate Wells Farm & Nursery and also Ralph Wells Landscaping on and from the 14.29 acre subject property located at 32925 SE 46th Street, within unincorporated King County, the vicinity of Fall City. The Appellant’s contention that both of these business operations have operated at/from this location since 1990 is un rebutted, although the Department of Development and Environmental Services (“DDES” or the “Department”) contends that the “landscaping business and related services” portion of the Wells business have never been permitted on this property. The Appellant disagrees and that is the central issue of this appeal.
2. The Department served a notice of Code Violation: Civil Penalty Order: Abatement Order and Notice of Lien upon the Appellant April 13, 1998. In that Notice and Order the Department cited Ralph and Margaret Wells with the code violation of “operation of a landscaping business (construction and trades)” in the UR/POTR for Zone Classification, citing KCC 21A.08.060. Further, the Department ordered the following measures as necessary to prevent the imposition of civil penalty, abatement or other enforcement measures:
 - Discontinue the operation of landscaping business;
 - Discontinue storage of rock, gravel and top soil used in the landscaping business;
 - Discontinue storage of equipment and trucks associated with the landscaping business.
3. On April 21, 1998, the Appellant, through attorney Linda M. Youngs, filled timely appeal. The Appellant argues the following:
 - a. Finding case law to-the-point relatively scant, the Appellant cites 111 N.E. 2nd 453, 330 Mass. 95, known as Town of Needham v. Winslow Nurseries, Inc. This case addresses many of the same terms inherent in the instant case, such as *greenhouses, nurseries, garden shop, landscaping* and so on. The essence of this interpretation is that the definition of the permitted use *by horticultural nursery* does not include the business of landscaping or related activities or uses.
 - b. That the activities and equipment cited by the Department are an integral part of the nursery business, an integral part of the sale of garden, building and hardware materials and farming operations which legally operate on the site.
 - c. That the cited use of the property is “grandfathered” (vested) to KCC Title 21 (which expired approximately 3 years after the date the contested uses were established on this property).
 - d. That, even if these uses are not grandfathered or vested pursuant to KCC Title 21, they are authorized pursuant to KCC Title 21A, by operation of the principle stated in subparagraph a. of this Finding.
 - e. If the offending trucks and heavy equipment were stored offsite, the number of truck trips to/from the site would “increase” thereby increasing impacts upon local streets and properties. This argument and probable fact underscores the principle espoused in subparagraph a. of this Finding.

- f. That King County, through its Enforcement Officer Lamar Reed (an actor in these proceedings as well) inspected the premises in 1991. Mr. Reed did not raise any issues regarding the use of trucks on the site or the storage of bulk materials “such as top soil and bark.”
4. The Department responds to the appeal in these ways:
 - a. That the Department issued “Interpretation #5,” in 1993, interpreting KCC 21.21A.030.D and KCC 21.25.020.C.3, regarding “horticultural nursery and landscaping business” uses.
 - b. That the distinction in subparagraph a. of this Finding applies to both KCC Title 21 and the superseding KCC Title 21A.
 - c. That, in addition, the use categories and definitions contained in the Standard Industrial Classification (SIC) system upon which KCC Title 21A is based, exclude the activities and uses at issue here in this Urban Reserve (UR) classified property.
5. In addition to the circumstances described in Finding 1, above, the following additional facts are relevant:
 - a. When the Appellant purchased the property it was operated as a farm. The Appellant continued those farm operations, modifying the crop mix and expanding operations to sell nursery plants, bulbs, flowers, trees and vegetables at retail. Supplementing the sale of these landscaping plants, the Appellant added incidental sales of gardening equipment and supplies, including ornamental garden sculpture, top soil, bark, gravel and large landscape rock. Greenhouses also were constructed.
 - b. As a part of the nursery operation, the Appellant sold landscaping services to those individuals who purchased their plant material from Wells Farm and Nursery. According to the Appellant, the business did not market itself as a landscaping business except to its own nursery customers.
 - c. The two business activities – nursery operations and landscaping operations – share the same vehicles and equipment, all of which are used onsite; two pickup trucks, a van, four small dump trucks, two large dump trucks, one bulldozer, one John Deere loader, one track machine (used for lifting large trees and setting rocks) and farm tractors. Onsite this equipment is used to cultivate and move nursery stock and supplies, including bulk storage. Offsite the same equipment is used to deliver topsoil, gravel, and large landscape rock and nursery products
 - d. Although the Department’s inspector and code enforcement officer visited the property in 1991 (as indicated in FINDING 3.d above), the hearing record is unclear as to the number of trucks and equipment onsite at that time. In addition, the hearing record is unclear as to whether large quarry rock was stored onsite then.
6. Any portion of any of the following conclusions, which may be construed as a Finding, is incorporated here by reference.

CONCLUSIONS:

1. Let's begin with KCC Title 21, the condition of law existing when the Appellant first established/modified the use of the property. If the Appellant's arguments stand on KCC Title 21, there is no need to review this matter further.
 - a. Pursuant to KCC Title 21, the subject property in 1990 was classified GR (*Growth Reserve*), governed then by KCC Chapter 21.21. KCC 21.21.020 permitted any use permitted in the G-5 (*General, 5 acre minimum lot size*) classification established by KCC Chapter 21.25, "under the same conditions as set forth in the KCC 21.25.020". In turn, KCC 21.25.020.B and -020.C, which operate interdependently, permit (among others) the following uses: *horticultural nurseries; greenhouses; and, agricultural crops*.

What is this use or activity called *landscaping* which, the Department contends is prohibited by terms of KCC Chapter 21? The Department cites Principle of Horticulture at page 7 (E. Denisen, 1979) which may be read two ways. On one hand, the Department emphasizes that aspect of the Principles definition which describes the placement of a number of items that are not "horticultural plants" but, that include "walks, drives, fences" and so on. Thus, the Department concludes that landscaping and horticulture are distinctively different activities. It achieves this conclusion by comparing the meaning of "landscaping business" contained in Principles with a description of *horticultural nursery* stated in Horticulture; a Basic Awareness at page 139 (Baudendistel, 1979). Apparently author Baudendistel and author Denisen did not consult each other.

In it's Interpretation #5 review, the Department overlooked that portion of the Principle description of landscaping which identifies it as a "phase of horticulture." In other words the very source that the Department cites as a basis for distinguishing landscaping *from* horticulture actually describes landscaping as a *phase* of horticulture!

- b. More to the Department's point, however, KCC 21.04.475 defines the permitted horticultural nursery as meaning:

... an area for the cultivation and propagation of trees, shrubs and plants, which are grown for transplanting. This can be accomplished in open ground or in pots and containers either outdoors or within structures. A horticultural nursery does not involve retail sales unless specifically permitted by the zone.

From this definition the Department concludes that a business, which conducts landscaping activities, can only operate on or from the site if it is permitted under a use category other than "horticultural nursery".

- c. Although DDES Interpretation #5 contains information useful to this analysis, it does not, in the strict sense, govern this property with respect to the issues in this appeal (either before or after the adoption of KCC Title 21.A) for the following reasons:
 - Interpretation #5 is not an administrative rule (such, as the Department may believe). Apparently, because the Department has filed Interpretation #5 with the Clerk of the King County Council, the Department believes that it is a "rule" having regulatory

effect. However, Interpretation #5 fails to meet the definition of “rule” established by KCC 2.98.020.D. It is not an “agency order, directive or regulation”. Rather, Interpretation #5 is more accurately described by KCC 2.98.040.A.2; ...“those statements of policy and interpretations of policy, and the Constitution which have been adopted by the Agency”. KCC 2.98.040.A makes clear that such statements of policy and interpretation are not the same as and are separate from “rules”.

- Further, any use legally established prior to Interpretation #5 must be regarded as grandfathered or vested. We are unaware of any authority that applies Interpretation #5 retroactively.
- KCC 2.98.030.B.4 authorizes filing with the Clerk of the Council,

“Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Agency.”

Interpretation #5 is not a “rule” as defined by KCC 2.98.020.D. Therefore, it is not a rule as contemplated by KCC 2.98.030.A. Consequently, it is merely a “statement” as contemplated by KCC 2.98.030.B, most particularly KCC 2.98.030.B.2.

- d. However, in the case of Needham, the Court held that a horticultural nursery includes related landscaping services. In this case, as in the case of KCC Title 21, the Standard Industrial Classification (SIC) system does not apply. The Court held that these activities, including the landscaping activities, were part of a normal nursery and greenhouse operation. We are unaware of any authority or that suggests that this case law, the only case law offered in this review, should be given any less weight than Interpretation #5, particularly considering Conclusion 1.c, above. In Needham the Court specifically found that the nursery or greenhouse business included not only the sale of peat moss, fertilizers, humus and mulches, but also:

- The business of contracting to plant trees, shrubs, plants, and lawns for others, using nursery stock both grown on the premises and obtained elsewhere.
- The maintenance of trucks and other mechanical equipment, including both indoor and outdoor sterilizers, for use in connection with the nursery business.

We may not use Needham V. Winslow for the purpose of determining which uses are permitted within which zoning categories (because, presumably, the 1953 City of Needham zoning code was not identical to the 1990 King County zoning code). However, regarding the definitions used in the King County code (KCC Title 21), the Needham case is directly on point. *The County is erroneously treating the Wells operation as a large scale landscaping business instead of as a landscaping component of the nursery business; i.e., as an accessory use.* Anderson’s American Law of Zoning, Section 17.32, an established and respected legal zoning authority, acknowledges that greenhouses and nurseries commonly include landscaping services as customary accessory uses.

2. There is no need to review further KCC Title 21A and the SIC in as much as the foregoing conclusions support the decision below to allow continued use of the subject property in the manner it is now used

and – consistent with this hearing record – has been used since 1990. The landscaping business, including, onsite storage of necessary materials, vehicles and equipment, is vested as a nonconforming accessory use to the horticultural nursery business. This conclusion does not authorize the landscaping portion of the business to grow so large that it constitutes more than an “accessory use”.

DECISION:

The appeal is GRANTED. The use and activities of the subject property as established in 1990 and as conducted since then as described in Findings #1 and 5, above, are authorized -- as an accessory use pursuant to KCC Title 21.

ORDER:

The Department shall immediately remove any Notice of Lien against the subject property, which may have been recorded.

ORDERED this 24th day of November 1998.

R.S. Titus
Deputy Hearing Examiner

TRANSMITTED this 24th day of November 1998, via certified mail to:

Ralph Wells	Linda Youngs, Attorney at Law
2004 132 nd Avenue SE	10777 Main Street, #300
Bellevue, WA 98005	Bellevue, WA 98004

TRANSMITTED this 24th day of November, 1998, to the following:

Ken Dinsmore	LaMar Reed	Jeri Breazeal
DDES/Building Services	DDES/Building Services	DDES/Building Services

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one days of issuance of the decision.

MINUTES OF THE NOVEMBER 5, 1998, PUBLIC HEARING ON DDES FILE NO. E9701343 - RALPH AND MARGARET WELLS.

R.S. Titus was the Hearing Examiner for this matter. Participating at the hearing were Lamar Reed, representing the Code Enforcement Section; Ralph Wells and Linda Youngs.

The following exhibits were offered and entered into the record:

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| Exhibit No. 1 | Department of Development and Environmental Services Preliminary Report to the Hearing Examiner for the November 5, 1998 public hearing |
| Exhibit No. 2 | Copy of letter to Linda Youngs from Lamar Reed, dated October 15, 1998 |
| Exhibit No. 3 | Copy of Chapter 21.32, M-L Manufacturing Classification |
| Exhibit No. 4 | Copy of Chapter 21.21, GR Growth Reserve Classification |
| Exhibit No. 5 | Copy of Chapter 21.25 G-5, General 5 Acres Classification |
| Exhibit No. 6 | Copy of administrative interpretations, horticultural nursery, and landscaping business |
| Exhibit No. 7 | Copy of Chapter 21A.06.247 construction and trades definition |
| Exhibit No. 8 | Copy of 21A.08.060 government/business service land uses (table) |
| Exhibit No. 9 | Copy of Mr. & Mrs. Well's appeal and attachment dated April 21, 1998 |
| Exhibit No. 10 | Copy of Notice and Order dated April 13, 1998 |

- Exhibit No. 11 Copy of letter dated December 29, 1997, advising Mr. & Mrs. Wells of the alleged violation
- Exhibit No. 12 Copy of Notice of Pre-Hearing Conference dated August 5, 1998
- Exhibit No. 13 Copy of Standard Industrial Classification Industry Group #078
- Exhibit No. 14 Copy of Chapter 21A.08.070 Retail Land Uses
- Exhibit No. 15 Copy of Chapter 21A.06.145 Building, Hardware & Garden materials store
- Exhibit No. 16 Copy of Standard Industrial Classification Major Group 52, Industry Group No. 526
- Exhibit No. 17 Map of the site
- Exhibit No. 18 Photos of site taken by DDES Staff
- Exhibit No. 19 Not offered
- Exhibit No. 20 GIS aerial map of subject area
- Exhibit No. 21 14 Photos of site presented by appellant
- Exhibit No. 22 SIC Manual excerpt - Major Group 01

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